

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

v.

No. 95-7473

JOHN AVENT DOWDY,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of North Carolina, at Durham.
Richard C. Erwin, Senior District Judge.
(CR-93-111, CA-94-532-1)

Submitted: March 5, 1996

Decided: October 6, 1997

Before WIDENER, HALL, and MICHAEL,
Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

John Avent Dowdy, Appellant Pro Se. Lisa Blue Boggs, Assistant
United States Attorney, Greensboro, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See
Local Rule 36(c).

OPINION

PER CURIAM:

John Avent Dowdy appeals the district court's order denying relief on his 28 U.S.C. § 2255 (1988) petition. The magistrate judge considered the claims raised in Dowdy's petition and recommended that it be dismissed. The district court, after conducting a de novo review, adopted the magistrate judge's recommendation and entered judgment dismissing the petition. As to the claims addressed in the magistrate judge's recommendation and considered by the district court, we affirm on the reasoning of the district court.

We cover one other matter. In his reply to the government's response filed before the magistrate judge, Dowdy claimed for the first time that his retained defense counsel was ineffective for failing to file a notice of appeal.¹ This claim was made in the last filing scheduled by the magistrate judge, and neither the government nor defense counsel in his affidavit had an opportunity to address it. Dowdy did not make a motion to amend his petition to add this claim. The magistrate judge did not consider the late claim, stating in his recommendation that he was ruling "on claims actually raised in the petition, not claims raised for the first time in reply." In his objections to the magistrate judge's recommendation filed with the district court, Dowdy noted that the magistrate judge had not considered Dowdy's claim that his counsel had failed to appeal. It appears that the district court, which adopted the magistrate judge's recommendation, likewise did not consider this claim. Because the claim was raised so late in what were full proceedings before the magistrate judge, the magistrate judge and the district court did not err in declining to consider it. See Barrett v. United States, 965 F.2d 1184, 1186-88 (1st Cir. 1992).

We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

¹ In his lengthy petition Dowdy alleged at least five specific ways in which his counsel was ineffective, but the failure to appeal was not mentioned.

The judgment of the district court is affirmed. **2**

AFFIRMED

2 Dowdy's "motion for summary reversal" is denied.